COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2013-SC-000526-DR

NORTON HEALTHCARE, INC. APPELLANT

Court of Appeals
Case No. 2012-CA-000217-MR

v.

Appeal from Jefferson Circuit Court
Case No 08-CI-00274

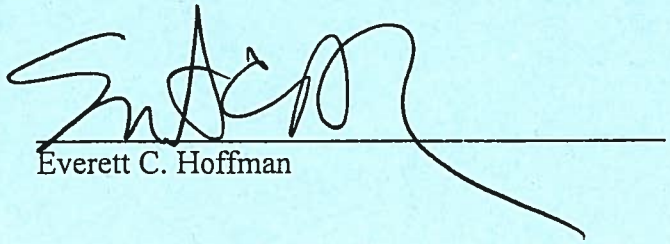
LUAL A. DENG (formerly Jacob L. Aker) APPELLEE

BRIEF OF APPELLEE

Everett C. Hoffman
Priddy, Cutler, Naake & Meade, PLLC
800 Republic Building
429 W Muhammad Ali Blvd
Louisville, KY 40202-2346
Tel 502/744-9119
Fax 502/569-2744
Email hoffman@pcnmlaw.com

Certificate of Service

The undersigned hereby certifies that, on this 12th day of December 2014, true copies of this response were served upon the following by U.S. Mail, first class postage prepaid: Donna King Perry, Jeremy S Rogers and Alina Klimkina, Dinsmore & Shohl LLP, 101 South Fifth Street, 2500 National City Tower, Louisville, KY 40202; Samuel P Givens, Jr, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; and Hon. Audra J Eckerle, Jefferson Circuit Judge, Division Seven, Jefferson County Judicial Center, 700 W. Jefferson St., Louisville, KY 40202.



Everett C. Hoffman

INTRODUCTION

Norton Healthcare, Inc., ("Norton") appeals a decision by the Court of Appeals that reversed the circuit court's dismissal of an employment retaliation claim brought under the Kentucky Civil Rights Act. The claim arose from Norton's refusal to reinstate the Appellee's employment following a grievance decision in his favor because, after months of unsuccessful efforts to obtain reinstatement, he filed a *pro se* action alleging race discrimination. The Appellee contends herein that the Court of Appeals was correct to find that he had engaged in protected activity; that a statement made by Norton's Associate Vice President and Assistant General Counsel clearly evinced a retaliatory intent; that the statement was not made in the context of compromise negotiations; that the statement constituted a separate and independent basis for liability; and that the Appellee, as he had argued in circuit court, had satisfied the adverse action element of his *prima facie* case under a *McDonnell-Douglas* framework.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee Lual A. Deng also desires oral argument. Appellee believes that oral argument might assist the Court in resolving the legal issues raised by the Appellant.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee Lual Deng, formerly Jacob Aker ("Aker"),[1] does not accept Norton's Statement of the Case because it omits many of the facts that he believes are essential to a fair and adequate consideration of the legal issues presented in Norton's appeal. Aker offers this counterstatement.

A. Appellee's Background.

Aker is one of the "lost boys of Sudan" who immigrated to the United States in 2001 as a refugee from the violence of the Sudanese Civil War. [Jacob Aker Depo, pg 69.] He completed high school in a refugee camp in Kenya and was 22 years old when he was resettled in Louisville with the assistance of Kentucky Refugee Ministries. [Aker Depo, pgs 66, 69; R. 230, Plaintiff's Exhibit 1, Interrogatory Answer No 2.] His mother and a sibling remained in Sudan. [Aker Depo, pg 248.] Aker is a member of the Dinka ethnic group and Dinka is his native language. As evidenced by the comments of counsel and the court reporter at his deposition, and the extensive Errata Sheet to his deposition, Aker speaks English with a heavy accent. [Aker Depo, pg 182-186.]

In 2002, within months after his arrival in Louisville, Aker successfully completed his General Educational Development (G.E.D.) exams and obtained his high school equivalency diploma. [R. 230, Plaintiff's Ex 1, Interrogatory Answer No 2.] In January 2010,

---

[1] "Jacob Aker" was the Appellee's name at the time of his employment with Norton and is the name reflected in Norton's personnel records. In 2008, when the Appellee obtained United States citizenship, he returned to his birth name, "Lual Aker Deng." [R. 229, Plaintiff's Ex 1, Interrogatory Answer No 1.] For purposes of this Brief, the Appellee will be referred to as "Aker."

he enrolled in Western Kentucky University in Bowling Green to obtain a bachelor's degree. [*Id.*]

B. Appellee's Employment with Norton 2002-2007.

In May 2002, Aker left a janitorial position with another hospital and took a position at Norton's downtown hospital in the linen department. [Aker Depo, pg 70; R. 231, Plaintiff's Ex 1, Interrogatory Answer No 3.] In September 2006, he transferred to a position as "patient care associate" ("PCA") on the transitional care unit ("TCU") at Norton Audubon Hospital ("Audubon") and remained in that position until his suspension (and subsequent discharge) on August 20, 2007.

C. No Prior Discipline.

Prior to the incident leading to his termination in August 2007, Aker had been counseled on aspects of his job performance, but had never before received any disciplinary action or been assigned any disciplinary points under Norton's Progressive Discipline policy. [Karen Higdon Depo, pg 73; R. 250-53, Plaintiff's Ex 3, Norton Progressive Discipline Policy.] Karen Higdon, who was the Nurse Manager for the Audubon TCU during Aker's tenure there, made the following comments about Aker during her deposition:

- There was nothing in Aker's personnel file that gave Higdon any second thoughts about accepting his transfer to the Audubon TCU in September 2006. [Higdon Depo, pg 48.]
- At the time of the August 14, 2007, incident, Higdon had a good impression of Aker and had no concerns about his relationship with other staff on the Audubon TCU. [Higdon Depo, pgs 51-52.]
- Prior to the incident on August 14, 2007, Higdon was unaware of any allegation or complaint that Aker had been rude or inappropriate with any other staff member. [Higdon Depo, pgs 71, 75.]

D. Racially-Inappropriate Remarks Directed at Appellee While at Audubon TCU.

During his deposition, Aker described a series of racially-inappropriate remarks directed at him by Audubon personnel, which he will not detail here. He did not become concerned about these remarks until after the events of August 2007, when he reflected back on his experiences at Audubon. However, one remark by Assistant Nurse Manager Chuck Copeck in 2007 caused him immediate concern. [Aker Depo, pgs 195-202.] When asked by Copeck to move some equipment, Aker responded that the equipment in question was the responsibility of another PCA. Copeck responded with words to the effect of "I don't care whose it is – I want you to take it down there now," and then remarked "I have to get to the point with this nigger." [Aker Depo, pg 197.] Another PCA was present and heard Copeck's words. [R. 248, Plaintiff's Ex 2, William Ruei Affidavit, ¶ 2.]

When Aker reported Copeck's use of the "n-word" to Nurse Manager Karen Higdon, she responded by telling Aker "Do you know if you keep talking about this topic, you can lose your job? . . . Don't ever talk about being called an n-word. . . . We don't tolerate this behavior at Norton – so if you keep talking about that, you might lose your job on that issue . . ." [Aker Depo, pgs 211, 262.] Aker was never told about the final disposition of his complaint to Higdon. [Aker Depo, pgs 212-213.] At his deposition, Copeck could not "recall" ever being counseled about using offensive language. [Copeck Depo, pg 25.]

E. Events of August 14, 2007.

The incident for which Aker was terminated occurred on August 14, 2007. On that date, he was accused of making threatening statements to Charge Nurse Jean Paulraj while

he was reporting offensive remarks made to him earlier in the evening by RN Gloria Pescador.

On the night of August 14, 2007, Aker and RN Pescador were working together with the same group of patients. Aker had been directed to take a particular patient's blood glucose level every two hours. [Aker Depo, pgs 135-136.] At one point Pescador asked Aker, who was using the computer to chart patient information, if he had taken the patient's blood sugar, to which Aker responded "yes" and that he had posted the results on the board as required. [Aker Depo, pgs 136-137.] Pescador asked Aker to check it again, and that she needed him to get up and do it "right now." [Aker Depo, pg 137.] Aker responded that he would get up and check the patient's blood glucose level as soon as he had shut down the computer, "because in our policy, if you go anywhere, you don't leave your computer with information on the screen." [Aker Depo, pg. 137.] [2] Pescador's response was to start "cussing" at Aker, saying "I'm fucking tired of you. Everyone is talking about you on the unit" and "you're fucking stupid." [Aker Depo, pgs 137, 148-149, 257-258.]

Aker decided to report the incident to the charge nurse on duty that night, Jean Paulraj. "Since she insulted me multiple time in form of humiliation, I was thinking of reporting her to boss." [Aker Depo, pg 153.] As Aker relayed to Paulraj what Pescador had said to him, Pescador walked up, stepped between Aker and Paulraj, and yelled angrily at Aker, "What are you talking to Jean about? This is going to finish between you and me."

---

[2] Hospital policy in this regard was confirmed by Nurse Manager Karen Higdon, who stated that a PCA who is charting patient information on the Electronic Medical Records (EMR) system is required to close out his activity on the computer before attending to any other task. [Higdon Depo, pgs 43-44.]

[Aker Depo, pg 138.] Aker stepped back, saying "Please. I'm talking to Jean at this time. Let me talk to Jean." [Aker Depo, pg 139.] Pescador tried to intervene a second time and then left, calling Aker "stupid." [*Id.*]

After Pescador walked away, Aker told Paulraj that, if Pescador was going to cuss at him all night, she needed to do something. [Aker Depo, pg 140.] Aker suggested to Paulraj that she change the patient assignments so that he and Pescador would not be working together for the rest of the shift. [*Id.*]

Aker has steadfastly denied the charge that at he told Paulraj that "something was going to happen" if she did not intervene. [Aker Depo, pgs 150-151.] What he said to Paulraj was "you need to do something." [Aker Depo, pg 151.]

> I didn't say if she going to do that, something is going to happen. I would say she -- this was a report. What I'm asking this, this -- when I was doing the report to Jean, I was explaining exactly what she [Pescador] does to me. This a time I say, "If she -- she been cussing me like a child," and -- and I was telling Jean, "I'm not – I'm not a child. I don't have to be cussed at or insulted. And if she think that I do something wrong, she have to report me to you or to -- to another authority." This is -- this is what in my report.
>
> When I mentioned that she -- she -- she treated me like a child, like, the way she was insulting me. And then -- and then I did not say -- when I say if she going to cuss at me again, you need to do something, just -- but I did not say something else going to happen or something would happen.

[Aker Depo, pg 160.] Aker testified that he did not use a threatening tone of voice and that there was nothing threatening about his words or his actions. [Aker Depo, pgs 151, 161, 209] "[T]here's not a reason for her [to be] afraid of me." [Aker Depo, pg 151.] "I was not happy, but I was not angry." [Aker Depo, pg 162.]

Paulraj did not change the patient assignments and Aker finished out the shift on August 14th without incident and without any further interaction with Pescador.

F. Termination of Appellee's Employment

Before reporting for work again, Aker was placed on administrative leave pending investigation and was later told he was being discharged for threatening behavior. [Aker Depo, pg 156, 166.]

Karen Higdon defended the decision to discharge by stating that Aker's conduct constituted a terminable offense under Norton's progressive discipline policy. [Higdon Depo, pgs 73-75.] That policy lists "threatening employees" as a Level I offense (No. 4), resulting in six disciplinary points, "which may justify immediate termination, depending on the nature and severity of the action." [R. 251, Plaintiff's Ex 3, Norton Progressive Discipline Policy, pg 2 of 4.] On cross-examination, Higdon acknowledged that she "found it out of character for Jacob because he had never displayed that behavior before." [Higdon Depo, pg 81.]

Norton's records indicate that Aker was placed on administrative leave on August 15, 2007, and terminated effective August 20, 2007. [Higdon Depo, Ex 5, Counseling Record.] "Since this incident, I never work again." [Aker Depo, pg 155.]

G. Norton's Grievance Resolution Process.

Norton provided a Grievance Resolution Process to resolve work-related disputes. [R. 258, Plaintiff's Ex 5, Grievance Resolution Process, pg 1 of 3.] "In cases of termination, the employee will automatically advance to Step 3 and present his or her grievance to the

Grievance Resolution Team." [R. 259, Plaintiff's Ex 5, pg 2 of 3.] The policy directs the Grievance Resolution Team to make a "decision" on the employee's grievance:

> After the facts have been presented, the Team will discuss in private. The decision of the majority shall be the decision of the Team. The Team cannot make any decision that is inconsistent with written Norton Healthcare policy or applicable laws.
>
> The Team's decision will be documented on the Grievance Resolution form and communicated by Human Resources to the employee, the immediate supervisor, and the Manager/Director within five (5) working days.

[R. 259-60, Plaintiff's Ex 5, pgs 2-3 of 3.] Step 4 of the Grievance Resolution Process permits either party not satisfied with the Grievance Decision to "make a final appeal to their highest level ranking officer," whose decision "will be final and binding." [R. 260, Plaintiff's Ex 5, pg 3 of 3.]

H. Appellee's Grievance Over His Discharge Resolved in His Favor (Sep 28, 2007).

In accordance with Norton personnel policies, Aker filed a grievance over his discharge, stating that he did not threaten anyone on August 14, 2007, and that he was "fire[d] without me doing any wrong but follow[ing] the procedures and rules." [R. 262-64, Plaintiff's Ex 6, "Appeal Letter Grievance."] [3] A Grievance Team was convened on September 28, 2007.

Each Norton location has its own Grievance Resolution Team made up of volunteers who have been trained by Human Resources on the Progressive Discipline policy and other HR policies. [Phillip Taylor Depo, pgs 13, 17-18.] Audubon Grievance Team member

---

[3] In his grievance, Aker states that RN Gloria Pescador said "ash words" to him. At his deposition, Aker explained that "ash words" are insults. [Aker Depo, pg 158.]

Phillip Taylor testified that the role of the Team is to hear from all parties and make its own determination of where, within Norton's Progressive Disciplinary Policy, an employee's alleged offense really falls. [Taylor Depo, pg 18.] The Team might ultimately decide to uphold the decision of the manager to terminate/discipline an employee, to vacate that decision, or to reduce the category of the offense. [*Id.*]

At the hearing, the Grievance Team reviews the discipline document, the employee's appeal statement, and any other relevant documents and policies. [Taylor Depo, pgs 20-23.] The Team then hears from the grievant, his manager, and any witnesses that either side wishes to present. The Team is free to ask questions of all persons who appear before it. [Taylor Depo, pg 23.] Once the presentations are complete, the Team meets privately to discuss the case and reach a decision. [Taylor Depo, pgs 23-24.] Typically, the Team's decision is reached by a consensus of the Team members. [Taylor Depo, pg 24.] "We make our decisions right then and there . . . we sit there for however long it may take . . ." [Taylor Depo, pg 25.]

All of the witnesses cited in the Defendant's investigation report [R. 43-179 (Defendant's Summary Judgment Motion), Exhibit L] spoke at Aker's grievance hearing – Jean Paulraj, Gloria Pescador and Martin Rosenbaum. [Aker Depo, pg 174.] Grievance Team Member Phillip Taylor recalled the hearing and summarized the Team's view of the evidence as follows:

> [W]e did not feel like he deserved a Level I. We didn't feel like what he was accused of warranted a Level I. Plus, we really didn't feel strong enough that the accusations were that – was the way it was written on paper. It wasn't threatening. There wasn't enough evidence to support what the charges were.

* * * * *

> And going back to the policy for a Level I, I just think that would, in this particular case – it was not – there was no evidence of verbal language that was used that would cause a Level I – cause a person to think that they were in danger.

[Taylor Depo, pgs 29-30 (Emphasis added).]

> At the conclusion of the hearing, the Team issued the following decision:
>
> Due to the fact that we did not think there was conclusive evidence of a threat or intimidation constituting a Level I offense, it is the recommendation of this team that the offense be reduced to a Level II, that Jacob be mandated to attend EAP counseling, and that he be moved to a different unit/location.

[R. 265, Plaintiff's Ex 7, Resolution Form (Sep 28, 2007).]

Taylor testified that the Grievance Team members were unanimous in deciding that Aker's offense should be reduced to a Level II, reducing the number of disciplinary points from six to three, and reducing the discipline from discharge to counseling. [Taylor Depo, pgs 30-31.] [4] "We didn't feel it deserved a Level I, but there was some type of maybe perceived or actual disrespect, which did deserve to be acknowledged." [Taylor Depo, pg 34.]

Aker signed off on the Grievance Decision, stating that the issue was resolved to his satisfaction. [*Id.*] He described his understanding of the decision: "I'm going to get my job back, but it's going to be a different job that I was going to get back. Not the same one that I was doing." [Aker Depo, pg 191.] Aker believed he would be back at work in a different position "the next day." [Aker Depo, pg 230.]

---

[4] Under Norton's Progressive Discipline Policy, a Class II offense results in the imposition of three disciplinary points and "a final written counseling." [R. 250-51, Plaintiff's Ex 3, Progressive Discipline Policy, pgs 1-2 of 4.]

Nurse Manager Karen Higdon also accepted the Grievance Decision and did not appeal it to the Chief Administrative Officer. [Higdon Depo, pg 87.] "I was signing this to acknowledge what the grievance team said and to – I guess to say that that was okay and I wasn't going to take the grievance any further . . ." [*Id.*]

I. Norton's Employee Retention Program and its Failure to Reinstate Appellee's Employment

It is undisputed that Aker satisfied that portion of the Grievance Decision requiring him to attend counseling with Norton's Employee Assistance Program (EAP). [R. 270, Plaintiff's Ex 8, Norton Position Statement to EEOC, pg 4 (May 28 2008); Aker Depo, pgs 187-188.] It is also undisputed that, despite the reduction of his offense from a Class I to a Class II offense and the rescission of his discharge by the Grievance Resolution Team, Aker was never "moved to a different unit/location."

Norton argues that it implemented the Grievance Decision by allowing Aker to utilize the services of its "employee retention program," where he was purportedly given the opportunity to apply for other positions for a certain period, but would not receive a position unless he was offered one by a particular unit.[5] Norton has no policy or other documents explaining the "retention program" to which Aker was referred. [Jason Coffey Depo, pg 15.] Retention Manager Jason Coffey testified that he treated Aker the same as any other employee who was seeking a transfer to a different unit. [Coffey Depo, pgs 24, 87-88.] Coffey was unaware of the Grievance Decision and was instructed by Norton to simply help

[5] Aker was given 35 calendar days in Norton's retention program – from October 23, 2007, when Retention Manager Jason Coffey first met with him, until November 27, 2007, when he stopped providing "retention services" to Aker. [Jason Coffey Depo, pgs 27, 48-51, 80.]

Aker find a position other than at Audubon. [Coffey Depo, pgs 27, 40-41.] Coffey did not consider it part of his job to actively look for positions for Aker. [Coffey Depo, pg 84.] It was not communicated to Coffey that he had any obligation to find a position for Aker – just to help him for a period of 35 days – from October 23 to November 27, 2007. [Coffey Depo, pgs 28, 48-49.] Coffey stated that managers in the Norton system had no obligation to give preferences in hiring/placement to employees being helped through his retention program. [Coffey Depo, pgs 37-38.] As far as Norton managers were concerned, internal applicants in the retention program were no different than external applicants off the street. [Id.]

Norton claims that Aker failed to avail himself of the opportunity to apply for new positions while in the retention program. However, at his deposition, Aker testified that he made every effort to follow the directives of the retention manager, Jason Coffey. [Aker Depo, pgs 192, 253-255.] "I was told Jason's . . . is the one who's going to actually find a job for me . . . that we're going to work together, me and him, to find a job." [Aker Depo, pg 192.] Aker described meeting with Coffey twice. There was the initial meeting, on October 23, 2007, when Aker told Coffey that he would be willing to do anything, even part-time. [Aker Depo, pgs 177-179.] Aker recalled Coffey putting in his application for three different positions at that time. [Aker Depo, pg 178.] At the second meeting, Coffey told Aker that nobody was hiring him. [*Id.*] Aker made other attempts to see Coffey, but was told he was not in the office. [Aker Depo, pgs 180-181.] Whenever Aker called Coffey, Coffey would just say "No . . . nobody hiring you. No manager hiring you." [Aker Depo, pg 180.] Aker's employment with Norton was never reinstated.

J. Attorney Erwin Sherman's Efforts on Behalf of Appellee and Norton's Refusal to Reinstate Appellee Because Appellee Filed This Action Pro Se

In December 2007, more than two months had passed since the Grievance Decision in Aker's favor and he still had not been given a new position at Norton. In a letter dated December 19, 2007, Aker was advised by Norton that his "employment status" with Norton had changed effective November 28, 2007, and that he would be receiving information about his COBRA rights to continue his medical insurance. [R. 273, Plaintiff's Ex 9, Norton Letter (Dec 19, 2007).] Aker sought out the counsel and assistance of attorney Erwin Sherman. Sherman's affidavit discusses his efforts on behalf of Aker and the responses he received from Norton management. [R. 275-79, Plaintiff's Ex 10, Erwin Sherman Affidavit and attached correspondence.]

On December 21, 2007, Sherman sent a letter to Norton's Human Resources Department regarding Aker. In the letter, he pointed out that Aker had waited an inordinate amount of time to be advised as to when he may return to work after his appeal from a wrongful termination. Sherman requested that someone from Norton's Human Resources Department contact him.

Three weeks later, Sherman received a written response, dated January 11, 2008, from Thomas E. Powell, II, Associate Vice President and Assistant General Counsel for Norton Healthcare. Powell alleged that Aker "did not pursue the options presented to him" through Norton's employee retention program, but did not foreclose reinstatement, concluding his letter by stating "If Mr. Aker is still interested in pursuing a position with Norton Healthcare, please have him contact me at (502) 629-8190."

On February 27, 2008, after several attempts to follow up on Powell's offer to contact him, Aker filed this action *pro se* against Norton in Jefferson Circuit Court. Aker's *pro se* complaint states that "I was fired for no other reason but both racial and professional discrimination." [R. 281, Plaintiff's Ex 11, *Pro Se* Complaint (Feb 27, 2008).]

On March 5, 2008, Sherman had a telephone conversation with Powell regarding Aker's situation. Aker was sitting in Sherman's office when he spoke with Powell and heard what Powell said. [Aker Depo, pgs 263-264.] Sherman's purpose in calling Powell was to relay to him the efforts that Aker had made, in response to Powell's letter of January 8th, to contact Norton about returning to work. During the telephone conversation, which was short, Powell stated that because Aker had filed suit against Norton, Norton would not consider him for a position, even if Sherman were to dismiss the case that Mr. Aker had filed *pro se*.

Immediately after Sherman's telephone conversation with Powell, Sherman dictated a letter to Powell, which was typed up and sent out on the following day, March 6, 2008. Sherman's letter states, "To confirm our brief conversation today, you said because Mr. Aker filed suit you will not consider him for a position, even if he were to dismiss the case he filed pro-bono [sic]."

Aker subsequently secured legal counsel to represent him in the Jefferson Circuit Court matter. His Amended Complaint was filed on February 8, 2010. [R. 283-87, Plaintiff's Ex 12, Amended Complaint.]

K. Circuit Court Proceedings.

On February 3, 2010, undersigned counsel entered his appearance on behalf of Aker and filed a motion for leave to amend the complaint, which was granted by the circuit court on February 8, 2010. [R. 21-22, Entry of Appearance; R. 13-14, Motion to Amend; R. 15, Order.]

Aker's Amended Complaint states four claims against Norton – one for breach of contract, one for employment discrimination in violation of the Kentucky Civil Rights Act (KCRA), and two for retaliation in violation of the KCRA. [R. 16-20, Amended Complaint.] The first cause of action contended that Norton's failure to reinstate Aker's employment following the Grievance Decision constituted a breach of contract. The second cause of action contended that the decisions to terminate Aker's employment and not to reinstate him were made without justification, as determined by the Grievance Decision, and that the false allegation that he threatened another employee on August 14, 2007, was a pretext for discrimination based on his race, color and national origin, in violation of the KCRA, specifically KRS 344.040. The third cause of action was a retaliation claim contending that Norton's termination of Aker's employment and refusal to reinstate him were in retaliation for his efforts to report the conduct of Assistant Nurse Manager Charles "Chuck" Copeck, who called him the "N-word" in the presence of other Norton Audubon personnel, in violation of the anti-retaliation provisions of the KCRA, specifically KRS 344.280(1).

Aker's fourth and final cause of action is the subject of this appeal and states a second and independent retaliation claim for Norton's refusal to consider him for reinstatement

following his filing of this action *pro se*. [R. 18-19, Amended Complaint pgs 3-4, ¶¶ 16-17, 23.]

In its summary judgment motion, Norton contended that Aker had not satisfied the "protected activity," "causal connection," and "pretext" elements of the current claim, but did not dispute that he had satisfied the "adverse action" element. [R. 43-150, Norton Summary Judgment Motion; R. 288-303, Norton Summary Judgment Reply.] In his summary judgment response, Aker argued that he had satisfied each of the required elements, including "adverse action." [R. 192-222, Aker Summary Judgment Response.] The details of the parties pleadings, including cites to particular page numbers, are discussed as part of Argument III, below.

The circuit court granted Norton's motion for summary judgment and dismissed all four of Aker's claims. [R. 317-328, Opinion and Order (Jan 5, 2012).] The circuit court dismissed this particular claim on the grounds urged by Norton, and made no mention of any failure by Aker to satisfy the adverse action prong. [R. 223-287, Opinion and Order, pg 10.]

Aker filed a timely appeal of the circuit court's dismissal of his three civil rights claims.

L. Aker's Civil Appeal Prehearing Statement (Form AOC-070)

In its Statement of the Case, Norton quotes from Aker's Civil Appeal Prehearing Statement (Form AOC-070) and appears to argue that Aker failed to preserve any appealable issues related to his second retaliation claim, the one claim now before this Court. [Norton Brief, pg 6] Form AOC-070 calls for a "**Brief** statement of facts, claims, defenses, and issues

litigated." (Emphasis in original.) As accurately quoted by Norton, Aker's Prehearing Statement summarized the "facts and issues," in relevant part, as follows:

> The Plaintiff claims that the Defendant's termination of, and subsequent refusal to reinstate, his employment constituted . . . (3) retaliation for his prior efforts to report and oppose discriminatory acts in violation of KRS 344.280. The Circuit Court granted the Defendant's motion for summary judgement as to all of the Plaintiff's claims.

[Prehearing Statement (Feb 7, 2012), Appendix 4 to Norton's Brief (emphasis added).] Aker's Prehearing Statement also listed the following as "Issues Proposed to Be Raised on Appeal:"

> (1) Whether the Circuit Court erred in granting the Defendant's motion for summary judgment or any part thereof;
>
> * * * * *
>
> (3) Whether the Plaintiff established prima facie cases of discrimination and retaliation prohibited by the Kentucky Civil Rights Act, KRS Chapter 344; and
>
> (4) Whether the Plaintiff presented sufficient evidence from which a rational fact finder could conclude that the Defendant's stated reasons for terminating and failing to reinstate the Plaintiff's employment were pretextual and that the Defendant's true motives were discriminatory and/or retaliatory in violation of KRS Chapter 344.

[Id. (Emphasis added).]

As discussed in earlier sections of this Counterstatement, Aker's Amended Complaint stated two retaliation claims. [R.19, Amended Complaint, pg 4, ¶¶ 22-23.] Both claims alleged, as stated in the Prehearing Statement, "retaliation for his prior efforts to report and oppose discriminatory acts in violation of KRS 344.280." The first retaliation claim related to Aker's initial termination from employment and alleged retaliation for his prior report to

Nurse Manager Karen Higdon about the racist epithet used with him by Assistant Nurse Manager Chuck Copeck. The second claim (now before this Court) was related to Norton's "subsequent refusal to reinstate his employment" (Prehearing Statement) in retaliation for his prior *pro se* lawsuit.[6] Both Aker's report to Higdon and his *pro se* lawsuit constituted "prior efforts to report and oppose discriminatory acts," and both were clearly encompassed within the brief description of facts and issues on AOC-Form 070.

M. Court of Appeals Proceedings.

In his Appellant's Brief to the Court of Appeals, Aker once again argued that he had satisfied all of the elements of his *prima facie* case in his second retaliation claim, including specifically adverse action. [Aker Appellant's Brief - Court of Appeals, pg 22.] In its response brief, Norton argued for the first time that Aker had failed to satisfy the adverse action prong of this claim and that his adverse action burden was governed by a "failure to hire" line of cases requiring him, in Norton's view, to have continued submitting applications for specific positions following conclusion of his participation in the employee retention program. [Norton Appellee's Brief - Court of Appeals, pg 21.] In his necessarily brief reply, Aker contended that he "did not fail to take any action necessary to be considered for a new position," citing the Grievance Decision, his prior efforts to gain a position, and the unequivocal nature of Thomas Powell's letter of March 5, 2008. [Aker Reply Brief - Court of Appeals, pgs 3-4.] Again, the particular details of the parties' positions before the Court of Appeals are discussed in Argument III, below.

---

[6] As stated in the Amended Complaint, "Norton's refusal to consider Plaintiff for re-employment in retaliation for his filing this action *pro se* in Jefferson Circuit Court constituted a separate and distinct violation of KRS 344.[2]80." [Id., ¶ 23.]

In a decision dated July 5, 2013, the Court of Appeals affirmed dismissal of Aker's discrimination claim and his first retaliation claim, but reinstated the second retaliation claim, now before this Court. On Aker's discrimination claim, the Court of Appeals found that, although Norton's stated reasons for termination were "not particularly strong," Aker had produced insufficient evidence of pretext to survive summary judgment. On Aker's first retaliation claim, the Court of Appeals found that there was insufficient evidence of a causal connection between Aker's reporting of a racial slur by an Assistant Nurse Manager and his termination some time later.

However, the Court of Appeals overturned the circuit court's dismissal of Aker's second retaliation claim, which was based on the statement made to Aker's attorney (Erwin Sherman) by Norton's Thomas Powell. The Court of Appeals concluded that Powell's statement that Norton would not consider reinstating him precisely because he had filed a discrimination suit against it "would seem to be direct evidence of a retaliatory motive."[7] Court of Appeals Opinion (July 5, 2013), pgs 13-14. The Court of Appeals rejected Norton's argument that Powell's statement was made in the context of settlement negotiations and therefore inadmissible under Kentucky Rule of Evidence (KRE) 408, noting that "Powell's alleged statement was not made as part of a settlement negotiation, but was a statement declaring Norton's refusal to consider a compromise or settlement." Court of Appeals Opinion, pg 14, n.1. The Court of Appeals also noted that Aker offered the statement not as

---

[7] Judge Maze, who dissented on the issue of whether Aker had met his burden under a failure to hire analysis, agreed with the majority on the evidentiary import of Powell's statement. "Indeed, the majority correctly holds that Powell's remarks to Aker's prior counsel could be considered as direct evidence of a retaliatory motive." Court of Appeals Opinion, pg 17 (Maze, J., concurring in part and dissenting in part).

proof of his existing claims, but in support of a separate retaliation claim arising from Powell's own words. *Id.*

Finally, the Court of Appeals considered Norton's new adverse action argument, first raised on appeal, and examined the "failure to hire" cases first cited by Norton on appeal – but found that Aker was still correct in his assertion, made in circuit court, that he had satisfied the adverse action element of his second retaliation claim. The Court of Appeals assumed without deciding that Aker's claim was properly viewed as a "failure to hire" claim, as urged by Norton. However, although the "failure to hire" cases create a modified adverse action test under which a plaintiff is required to have submitted a formal application for a specific position, those same cases recognize a number of exceptions to the application requirement, such as where the employer is otherwise obligated to consider the plaintiff for a position, where the employer is aware of the plaintiff's interest, or where a formal application would be a futile gesture. The Court of Appeals found that the futile gesture exception applied and that Aker had established adverse action, as he had argued in circuit court. Court of Appeals Opinion, pgs 15-16.

N. Supreme Court Proceedings

Norton sought discretionary review by this Court on the one claim upheld by the Court of Appeals (Aker's second retaliation claim). Norton's motion was granted on June 11, 2014. Aker filed a cross-motion for discretionary review on the two claims rejected by the Court of Appeals (his discrimination claim and his first retaliation claim). Aker's cross-motion was denied on August 13, 2014.

ARGUMENT

I. NORTON DOES NOT DISPUTE THE FACTUAL ELEMENTS OF AKER'S REALIATION CLAIM

Throughout this litigation, Norton has failed to dispute any of the factual elements of Aker's retaliation claim. Norton does not deny that the unambiguous language of its personnel policies provided employees with a Grievance Resolution Process that, in the policy's own words, culminated in a "final and binding" decision. Norton does not dispute the decision of its own Grievance Resolution Team stating (1) that Aker had not engaged in dischargeable conduct; and (2) that he be reinstated to a position in a different location/unit. Norton does not deny that its management (specifically Nurse Manager Karen Higdon) chose not to appeal that Grievance Decision, stating "that that was okay and I wasn't going to take the grievance any further . . ." [Higdon Depo, pg 87.] Nor has Norton disputed the reasonableness of Aker's interpretation of the Grievance Decision – that "I'm going to get my job back, but it's going to be a different job," and that he would be back at work "the next day" [Aker Depo, pgs 191, 230]. And Norton does not dispute that Aker satisfied the one condition set forth in the Grievance Decision – that he attend counseling with Norton's Employee Assistance Program (EAP).

It is also undisputed that, from the date the Grievance Decision was issued (September 28, 2007), Aker made repeated efforts to gain reinstatement pursuant to the decision, including making formal application for at least three open positions during the five weeks he was in Norton's employee retention program. Within days after receiving a December 19th letter from Norton stating that Aker's "employment status" had "changed,"

Aker's attorney took up Aker's continuing efforts to obtain implementation of the Grievance Decision. As stated by Erwin Sherman, "[h]e has waited an inordinate amount of time to be advised as to when he may return to work after his appeal from a wrongful termination." [R. 277, Plaintiff's Ex 10, Sherman Ltr (Dec 21, 2007).] Norton cannot deny that, as late as January 11, 2008, Thomas Powell was still inviting Aker to apply for positions [R.195, Powell Ltr to Sherman (Jan 11, 2008)], even if he would not return Aker's phone calls. Nor can Norton dispute that Aker's filing of this action *pro se* on February 27, 2008, (stating "I was fired for no other reason but both racial and professional discrimination") constituted protected activity under KRS Chapter 344 of which Norton had knowledge.

Finally, Norton has never disputed that, when Sherman spoke with Powell on March 5, 2008, about Aker's continuing efforts to gain reinstatement, Powell made the unequivocal statement attributed to him by both attorney Sherman and Aker – that Norton would not consider Aker for a position because he had filed suit. And Norton has not disagreed with the Court of Appeals' unanimous assessment of Powell's statement – that it "would seem to be direct evidence of a retaliatory motive." Court of Appeals Opinion (July 5, 2013), pgs 13-14 (Majority Opinion), pg 17 (Maze, J., concurring in part and dissenting in part).

But, according to Norton, none of the foregoing matters, because it has three legal arguments that it claims will defeat Aker's claim no matter how strong his facts are. Norton's first argument is that Aker has failed to satisfy the adverse action element of his *prima facie* case because he has a "failure to hire" claim.[8] As such, Norton argues that Aker

[8] At points, Norton expresses its own doubts that this is a true "failure-to-hire" case, and suggests that it is really a "failure-to-settle" case (see Norton Brief, pgs 21, 26), but still devotes the bulk of its argument to a "failure-to-hire" analysis. Aker discusses Norton's "failure to settle"

must satisfy the elements of a modified *McDonnell-Douglas* test as set forth by the Sixth Circuit in *Wanger v. G.A. Gray Co.*, 872 F.2d 142, 145 (6th Cir. 1989).[9] According to Norton, in order to show adverse action under that modified standard, Aker was required at some point following the filing of his *pro se* lawsuit to have submitted a formal application for a specific open position, which he did not do. Norton's second argument is that Aker has failed to satisfy the causation element of his *prima facie* case because he has failed to show a sufficient connection between Powell's statement and Norton's final unambiguous refusal to consider him for employment. Norton's third argument is that Powell's statement cannot constitute the sole basis for a retaliation claim because it was inadmissible under Kentucky Rule of Evidence 408 as a statement made in settlement negotiations.

All three of Norton's arguments are misguided and appear solely designed to divert the Court's attention from the factual record. First, this is not a "failure to hire" case and the adverse action is clear – Norton's refusal to honor the "final and binding" decision of its own Grievance Resolution Team and reinstate Aker's employment pursuant to that decision, first announced unequivocally by Powell in his March 5th statement to Sherman. Moreover, even if this were a "failure to hire" case, Aker has satisfied his burden under the modified adverse action test by showing (1) that Norton had an obligation to reinstate his employment by virtue of its own Grievance Decision; (2) that Norton was aware of his continuing desire to

---

argument in Argument V, below.

[9] As discussed below (Argument III), Norton did not argue that Aker's retaliation claim had failed to satisfy the adverse action prong of his *prima facie* case until its brief to the Court of Appeals. Its circuit court briefs focused exclusively on the protected activity, causal connection, and pretext elements of Aker's claim.

be hired; and (3) that, under the circumstances, filing a formal application would have been a futile gesture, given the unequivocal nature of Powell's March 5th statement. Aker has also satisfied the causation element of his *prima facie* case by virtue of the content of Powell's statement, which the Court of Appeals correctly found constituted "direct evidence" of retaliation. Finally, as also found by the Court of Appeals, Powell's statement was not inadmissible because the conversation between Powell and Sherman did not constitute compromise negotiations and, moreover, Powell's statement constituted a separate and independent cause of action for retaliation.

II. AKER HAS ESTABLISHED ADVERSE ACTION AND HIS RETALIATION CLAIM IS NOT BARRED BY THE "FAILURE TO HIRE" DOCTRINE

In both his summary judgment response and his Appellant's brief in the Court of Appeals, Aker contended that he had satisfied the adverse action element of his *prima facie* case. He thus preserved his adverse action claim on appeal (See Argument III, below). Norton now argues to this Court that Aker's adverse action showing is inadequate because, in order to satisfy the adverse action element of a *prima facie* case in a "failure to hire" scenario, he was required to identify and formally apply for a specific job following his *pro se* lawsuit, which he did not do, arguing that Aker did no more than indicate a "general interest" in a new position. [Norton Brief, Argument IV-A, IV-B, pgs 22-26.] It also argues that the "futile gesture" exception to the application requirement does not apply in a claim for a retaliatory failure to hire. [Norton Brief, Argument IV-C, pgs 27-37.] Finally, Norton argues that it was error for the Court of Appeals to cite the "futile gesture" exception, since Aker had not explicitly claimed the "futile gesture" exception to the "failure to hire" rule in

any of his pleadings prior to the Court of Appeals opinion. Aker addresses the two substantive arguments here, and the issue preservation question in Argument III, below.

A. This Is Not a "Failure to Hire" Case. Norton's Adverse Action Against Aker Was its Unequivocal Refusal, Stated for the First Time by Thomas Powell on March 5, 2008, to Reinstate Aker's Employment Following the Grievance Decision in His Favor.

The fundamental flaw in Norton's "failure to hire" argument is that this is not a "failure to hire" case. Aker was not seeking to be newly hired by Norton – he was seeking reinstatement of his prior employment pursuant to the Grievance Decision stating he should be reinstated. Norton did not make its refusal to consider Aker for reinstatement unequivocal until Thomas Powell spoke to Erwin Sherman on March 5, 2008, stating that Aker would not be considered for a position because of his *pro se* action filed one week earlier.

The cases cited by Norton stand for the proposition that, in a "failure to hire" case, the adverse action prong of the plaintiff's *prima facie* requires additional elements of proof not required by a standard *McDonnell-Douglas* test. Aker discusses those additional elements of proof in subsequent arguments and shows that he has satisfied them. But the preliminary issue is whether Aker's claim is properly treated as a "failure to hire" case. The Court of Appeals assumed, without actually deciding, that it was. But none of the court decisions cited by either Norton or the Court of Appeals offer any support for the contention that a claim such as Aker's should be evaluated under the modified test. None of the cases cited provide any precedent for treating Aker's reinstatement claim as a "failure to hire" case.

Norton contends that one of the cases it has cited shares particularly similar facts with this one – *Velez v. Janssen Ortho, LLC*, 467 F.3d 802 (1st Cir. 2006). However, the facts in

Velez are very different from the facts here and only serve to illustrate why this case should not be viewed as a "failure to hire."

Plaintiff Velez was laid off by Janssen in December 1998, with $12,000 severance pay, following closure of the chemical plant in which she worked. *Velez,* 467 F.3d at 804. At the time of her layoff, Velez had a lawsuit pending against Janssen for sexual harassment. *Id.* More than two years after her layoff, in April 2001, Velez sent a cover letter and résumé to Janssen expressing interest in any position available for which Janssen considered her qualified. Janssen responded by stating that Velez would not be considered for rehiring and Velez filed a new action alleging a retaliatory "failure to hire," citing her prior lawsuit as her protected activity. The First Circuit upheld dismissal of Velez' claim under a "failure to hire" analysis, finding that she had failed to meet the "adverse employment action" element of her *prima facie* case. *Velez*, 467 F.3d at 807. Noting that Velez had only sent two general letters expressing interest in any available job, the court concluded that "that such general letters ordinarily cannot be the predicate for the adverse employment action prong in a retaliatory failure-to-hire case." *Id.*

The facts in *Velez* are nothing like those here. Unlike this case, Velez' employment relationship with Janssen had been completely severed two years earlier by virtue of her layoff and receipt of severance pay. For two years there had been no relationship whatsoever between Velez and her employer, no claim that she could make on her employer – no recall rights, no right to reinstatement, no right to be rehired, no claim equitable or legal for renewed employment, and no obligation whatsoever running from Janssen to Velez.

Notwithstanding her prior employment with Janssen, Velez was still an outside applicant seeking a new-hire position.

Other "failure to hire cases" cited by Norton follow the same pattern. *See, Wanger v. G.A. Gray Co.*, 872 F.2d 142, 145-46 (6th Cir. 1989) (noting that the plaintiff and his former employer, from whom he was now seeking a new position, were "strangers" since the plaintiff was "not contesting his discharge" from one year earlier and the employer had no obligation to consider him for rehire); *Owens v. Wellmont*, Inc., 343 Fed. Appx. 18 (6th Cir. 2009) (former employee seeking new position had previously been subject to a "legitimate reduction in force" under a policy that "does not provide any recall rights"); *Thompson v. Austin Peay State Univ.*, 2012 U.S. Dist. LEXIS 120416 (M.D. Tenn. Aug. 24, 2012) (former faculty member seeking new position had resigned her previous position to spend a year with her spouse in New York).

By contrast, in this case, Aker was seeking reinstatement of his prior employment pursuant to his employer's own decision overturning his discharge. From the date of the Grievance Decision (September 28, 2007), Aker focused his efforts on obtaining implementation of that decision, including working with Norton's Employee Retention Director, applying for no less than three open positions at other locations for which he was qualified, and seeking legal counsel to assist him. Although he was never offered a position pursuant to the decision, Aker was never unequivocally turned down until Thomas Powell spoke to Erwin Sherman on March 5, 2008. As late as January 11th, Powell was still inviting Aker to apply for reinstatement, concluding his letter of that date with the following: "If Mr. Aker is still interested in a position with Norton Healthcare, please have him contact me

directly at (502) 629-8190." Aker followed up on Powell's invitation and made efforts to contact him directly, still seeking implementation of the Grievance Decision. Not until March 5th did Aker receive Norton's unambiguous refusal to consider him further, based on the action he filed one week earlier. Unlike the plaintiff in *Velez*, Aker was no "stranger" to Norton. Unlike *Velez* and the other cases cited by Norton, Aker was not in the same position as an outside applicant, off-the-street, seeking a new hire position, and his claim is not a "failure to hire" claim.

B. Even if this is a Failure to Hire Case, Aker Has Established Adverse Employment Action

Even if this Court concludes that Aker's retaliation claim is properly viewed as a "failure to hire" case, he has still satisfied the adverse action element of his *prima facie* case. The Sixth Circuit's precedent in *Wanger* provides a plaintiff in a "failure to hire" case with four alternative means of establishing adverse action under a modified *McDonnell-Douglas* test: (1) submission of a formal application for an identified job opening; (2) establishing that the employer was "otherwise obligated" to consider the plaintiff for employment; (3) establishing the "employer's awareness of the employee's continuing desire to be hired;" or, finally; (4) establishing that the submission of a formal application for an identified job opening would have been a "futile gesture." Aker did not submit a formal application for employment following the filing of his *pro se* lawsuit on February 28, 2008 – but he has provided abundant and compelling evidence establishing each of the other three alternatives.

1. Norton was "otherwise obligated" to consider Aker for rehire.

In order to satisfy the adverse action prong of the modified *McDonnell-Douglas* test in a "failure to hire" case, *Wanger* holds that a plaintiff "must establish . . . that he applied for the available position **or can establish that the employer was otherwise obligated to consider him** . . ." Wanger, 872 F.2d at 145. The court noted that, in the case before it, the employer was not otherwise obligated. Like Aker in this case, Wanger was a former employee who had been discharged. But unlike Aker, Wanger was not contesting his prior discharge and was not making any claim based on his prior employment. "Wanger concedes that he is only contesting Gray's failure to rehire him when a position became available in 1984 and that he is not contesting his discharge in 1983." *Wanger*, 872 F.2d at 145. As stated by the court, Wanger was, for legal purposes, a "stranger" to the Gray Company to which it owed no obligation:

> [Wanger] had completely severed any relationship with the company by cashing out his retirement pension, exhausting his twelve-month severance pay package, and engaging in another vocation. In this case, where Wanger as the former employee and Gray as his former employer are strangers, there is no evidence in the record to suggest that Gray was obligated to consider Wanger for rehire.

Wanger, 872 F.2d at 146.

Aker, unlike Wanger, has satisfied the "otherwise obligated" test. Aker, unlike Wanger, had grounds for contesting his discharge, succeeded in getting it overturned pursuant to Norton's own policies and by Norton's own Grievance Resolution Team, and then set about obtaining implementation of that Grievance Decision. Norton was clearly "otherwise obligated" by its own policies and procedures to reinstate Aker's employment.

Norton's counter-argument has always been that Aker was an "at will" employee; that its policies and procedures, no matter what rights they appeared to confer, were in fact meaningless; and therefore, as found by the circuit court, that Aker had no legally enforceable contract claim to reinstatement. But just because Aker has no contract claim enforceable in circuit court does not mean that Norton was not "otherwise obligated" to reinstate his employment following the Grievance Decision. Nothing in the *Wanger* decision suggests that the Sixth Circuit's use of the term "otherwise obligated" was intended to be so narrowly construed. In this case, Norton may not have been obligated to reinstate Aker's employment by virtue of a court-enforceable contract claim – but it was certainly obligated to reinstate his employment under the terms of its own policies and procedures and under the terms of the Grievance Decision stating that he should be "moved to a different unit/location."

2. Norton was aware of Aker's continuing desire to be hired.

In *Wanger*, the Sixth Circuit also recognized a second alternative to the application requirement in a "failure to hire" case. In its discussion of the plaintiff's adverse action proof, the court cited with approval the holding of a district court case from Ohio (also cited by Norton), *Payne v. Bobbie Brooks, Inc.*, 505 F. Supp. 707, 717 (N.D. Ohio 1980), *aff'd*, 701 F.2d 180 (6th Cir.) (unpublished), *cert. denied*, 459 U.S. 858 (1982). In *Payne*, the U.S. district court stated that "an employer's awareness of the employee's continuing desire to be hired could be considered the functional equivalent of an application." *Payne*, 505 F. Supp. at 717. As stated in *Wanger*, the holding in *Payne* was as follows: "In the absence of a showing of futility or employer awareness that could constitute the functional equivalent of

an application, one must apply for the position in question before claiming employment discrimination." *Wanger*, 872 F.2d at 146, *citing Payne, supra*. In *Wanger*, even under a *Payne* analysis, the plaintiff could not establish adverse action. He had made no effort whatsoever to inform his former employer of his desire to be rehired. Instead, he argued that the Gray Company had an obligation to advise him of openings. The Sixth Circuit rejected Wanger's argument, stating that "there is nothing in the record to indicate that it was Gray's employment practice to recall former employees or to inform them of future job openings." *Id.*

In this case, by contrast, Aker took every conceivable step to ensure that Norton was aware of his desire to be reinstated. He attended EAP counseling, as required by the Grievance Decision. During the five weeks that Aker was in Norton's retention program, he applied for no fewer than three open positions for which he was qualified and he repeatedly contacted retention director Jason Coffey to see if other openings were available. On December 19, 2007, Norton sent Aker a letter stating that his "employment status" had "changed" (according to Norton he was no longer eligible for retention services and no longer considered an internal applicant) and advised him of his COBRA rights upon separation. [R. 273, Plaintiff's Ex 9.] Two days later (on Dec 21), attorney Erwin Sherman notified Norton's Human Resources Department that Aker was still waiting for the reinstatement ordered by the Grievance Committee on September 28th. [R. 275-279, Plaintiff's Ex 10, Sherman Affid, ¶ 4 and Affid Ex 1, Ltr to Norton (Dec 21 2007).] After Thomas Powell invited Aker in his letter of January 11, 2008, to contact him directly if he "is still interested in pursing a position with Norton Healthcare," Aker "left three unreturned

messages and went to the office of a Mr. Jeffrey, left his name and phone number." [R.279, Sherman Affid, Ex 3, Sherman Ltr to Powell (Mar 6 2008).] Norton cannot seriously argue that it was unaware of Aker's continuing claim to reinstatement in a new position. Aker has met his burden of establishing that Norton was aware of his "continuing desire to be hired" under *Wanger* and *Payne*.

3. The Submission of a Formal Application Would Have Been a Futile Gesture.

The third and final way in which a plaintiff who has failed to make formal application may nevertheless establish adverse action in a "failure to hire" case is through showing that the submission of an application would have been a futile gesture. *Wanger*, 872 F.2d at 145-46. As stated by the Court of Appeals, the failure to formally apply for a position is not fatal where the employer "creates an atmosphere in which employees understand that their applying for certain positions is fruitless . . ." Court of Appeals Opinion, pg 15, citing *Wanger*, 872 F.2d at 145. The Court of Appeals found that Aker met his burden in this regard by virtue of his evidence of repeated unsuccessful efforts to gain reinstatement following the Grievance Decision and the definitive nature of Thomas Powell's statement to Erwin Sherman on March 5, 2008, i.e. that Norton would not consider Aker for a position because he had filed suit, stating as follows:

> [A]n individual non-applicant must establish that the filing of an application would have been futile. . . . The alleged statement by Powell (which we believe to have been extremely ill advised) was clearly intended to discourage Aker from applying for any position after he filed his discrimination claim. Being told by a[n Associate] Vice President and the [Assistant] General Counsel of Norton that Aker would not be considered for a position, even if he dismissed the case, is a perfect demonstration of the futility in filing an application. In addition, the Grievance Resolution Team determined that

> Aker be given the opportunity to make an internal application for another position, which he did without success.
>
> We believe that Aker has met his burden to withstand summary judgment: he has shown his continuing interest in employment with Norton Healthcare, initially trying to get a transfer and applying for other positions. He also inquired as to when he could resume his employment, both personally and through his counsel's inquiry. It appears that there were other jobs that he was qualified for, but he was told he would not be considered. Once he was told that he would not be hired because he had filed suit, we do not believe that under these circumstances he had to apply and face certain rejection.

Court of Appeals Opinion, pgs 15-16. Even the panel's dissenting member agreed that "the majority presents a compelling argument that Aker could establish futility under the circumstances in this case." Court of Appeals Opinion, pg 17 (Maze, J., Concurring in Part and Dissenting in Part).[10]

Norton objects to the majority's ruling on two substantive grounds – (1) that the futile gesture doctrine is not available in a retaliatory "failure to hire" case, as distinguished from a "failure to hire" discrimination case; and (2) that Aker was still obligated to identify a specific position, even if he did not formally apply for one. There is no legal support for either contention.

In the retaliatory "failure to hire" decisions cited by Norton, futility did not arise as an issue, but none of those courts held that the exception does not apply in a retaliation case. To the contrary, all of those courts applied a *McDonnell-Douglas* burden-shifting framework to the plaintiffs' retaliation claims. As stated in *Wanger*, when applied in a "failure to hire"

---

[10] In *Wanger*, on very different facts, the Sixth Circuit found that the plaintiff had failed to establish a case of futility. "The mere fact that Gray thought about Wanger and generally concluded that he was probably not qualified does not amount to creating an atmosphere of futility." *Id.*

case, that burden-shifting framework is modified to require the plaintiff to have applied for a specific position unless he can show that one of the exceptions, like futility, applies. None of the cases cited by Norton hold otherwise.

The Court of Appeals was also correct to find that Aker was not required to either apply for, or identify, a specific position that he was seeking following the filing of his *pro se* lawsuit. Aker was not a trained professional or technician, did not have a degree beyond his G.E.D., and was not seeking a specialized position. At the time he was discharged, he was still on one of the lowest rungs of hospital employment, performing duties as a patient care associate for $10.50 per hour [Aker Depo, pg 245], and before that as a patient transport associate [Aker Depo, pgs 81-81] and a linen associate [Aker Depo, pgs 73-75]. As recognized by the Court of Appeals, the positions for which Aker was qualified were not scarce throughout the multiple hospitals and other facilities in Norton's sizable healthcare system. "It appears that there were other jobs that he was qualified for, but he was told he would not be considered." Court of Appeals Opinion, pg 16. Indeed, no fewer than three such openings for which Aker was qualified were identified by retention manager Coffey during Aker's brief five-week stint in the employee retention program. Despite Norton's refusal to provide him with any of these positions, Aker continued to express interest in any position for which he was qualified, stating he would be willing to do anything, even part-time. [Aker Depo, pgs 177-179.]

Under the facts in this case, Aker submits that the Court of Appeals was correct to conclude that he was not obligated to continue identifying specific positions following his unsuccessful participation in Norton's employee retention program. Norton was obligated

under the Grievance decision to reinstate Aker's employment at another location/unit, Aker had expressed his willingness to do anything, and he was continuing to express interest in any available opening, until he was finally told by Thomas Powell that Norton would not consider him for any position. Norton has not cited any cases casting doubt on the Court of Appeals conclusion that, "[o]nce he was told that he would not be hired because he had filed suit, we do not believe that under these circumstances he had to apply and face certain rejection." Court of Appeals Opinion, pg 16.

III. IT IS NORTON, NOT AKER, WHO HAS FAILED TO PRESERVE ITS ADVERSE ACTION ARGUMENTS FOR REVIEW

Norton contends that the Court of Appeals majority erred when it relied on the futile gesture exception, because Aker did not explicitly plead the exception in circuit court. However, as discussed below, Aker properly presented his adverse action claim in both the circuit court and the Court of Appeals. The Court of Appeals did nothing more than decide that the new arguments and the new case law presented by Norton (for the first time on appeal) did not negate the showing of adverse action made by Aker in circuit court. Ironically, it is Norton who failed to preserve its issues for review by failing to contest adverse action in circuit court. On that ground alone, the Court should reject Norton's "failure to hire" arguments, find that Aker's showing of adverse action went uncontested in the circuit court, and proceed to the other issues raised on appeal.

A. The Court of Appeals Was Not Precluded from Rejecting Norton's Adverse Action Argument Based on the Futile Gesture Exception to the Application Requirement.

This is not a case where "[t]he ground on which the Court of Appeals reversed was not argued to the trial court . . ." *Fischer v. Fischer*, 348 S.W.3d 582, 589 (Ky. 2011). As discussed above, the application requirement and the three exceptions to it (including futile gesture), to the extent they apply at all, are part of the *McDonnell-Douglas* adverse action prong in a plaintiff's *prima facie* case. From the beginning, Aker has contended that he has satisfied the adverse action prong of his retaliation claim under *McDonnell-Douglas*. It was that contention, made by Aker in both his circuit court and appellate briefs, that was upheld by the Court of Appeals.

Ironically, Aker's claim of adverse action – now so hotly disputed in this Court – went completely unchallenged throughout the circuit court proceedings. Aker argued in his circuit court pleadings that he satisfied of the adverse action requirement,[11] and Norton did not dispute it.[12] When the circuit court dismissed Aker's claim, it did so on the grounds

---

[11] Aker's summary judgment response stated, in pertinent part, as follows: "Finally, it cannot be disputed that Plaintiff suffered adverse employment actions following his protected activity. . . . Following the filing of Aker's *pro se* lawsuit, in which he stated that 'I was fired for no other reason but both racial and professional discrimination,' Norton refused to consider him further for reinstatement." [R. 192-222, Plaintiff's Summary Judgment Response - Jefferson Circuit Court (Oct 25 2011), pg 28]

[12] Norton did not contest the adverse action element of Aker's claim until the the Court of Appeals. In the circuit court, Norton argued that Aker had failed to satisfy the "protected activity," "causation" and "pretext" elements of his retaliation claim, but did not dispute that Aker had satisfied the adverse action prong in either of its circuit court briefs. Norton stated the following in its short discussion of this claim in its summary judgment brief:

> There is no record evidence to establish that Aker engaged in statutorily protected activity. Even if such evidence existed, Aker cannot show any causal connection between any protected activity and his termination from employment.

urged by Norton, making no mention of "adverse action." [R. 317-28, Circuit Court Opinion and Order, pg 10.]

In the Court of Appeals, Aker repeated his argument that he had satisfied the adverse action prong of his claim.[13] In response, Norton's Court of Appeals brief contested adverse action for the very first time and, even then, under an argument heading that cited only causal connection, not adverse action: "Aker Has Not Shown a Causal Connection between the Filing of His Lawsuit and Norton's Alleged Refusal to Re-Hire Him in February 2008." [Appellee's Brief - Court of Appeals, pgs 18-22.] Also for the very first time, Norton's Court of Appeals brief cited what it called a "failure to hire" line of cases under which Aker was purportedly required to take an additional step in order to satisfy adverse action – namely make formal application for an identified position. [Id., pgs 21-22.] In his five-page Reply brief, Aker countered that he "did not fail to take any action necessary to be considered for

---

* * * * *

> Aker cannot show any causal connection between any protected activity and his termination from employment. To establish the requisite causal connection to defeat summary judgment, Aker must produce sufficient evidence from which an inference can be drawn that his claimed protected activity was likely the reason for the adverse action.

* * * * *

> Finally, as addressed previously, Aker has shown no evidence of pretext.

[Defendant's Summary Judgment Brief, pgs 22-23] Norton also makes no mention of a "failure to hire" test in either of its circuit court briefs. [*Id.*]

[13] In his Appellant's Brief to the Court of Appeals, Aker repeated virtually verbatim the language from his circuit court brief: "Finally, it cannot be disputed that Appellant suffered adverse employment actions following his protected activity. . . . Following the filing of Aker's *pro se* lawsuit, in which he stated that 'I was fired for no other reason but both racial and professional discrimination,' Norton refused to consider him for reinstatement." [Appellant's Brief - Court of Appeals (Aug 14 2012), pg 22.]

a new position," citing the Grievance Decision and the efforts he had made to notify Norton of his continuing interest in reinstatement. Appellant's Reply Brief - Court of Appeals, pgs 3-4. "Norton cannot seriously argue that it was unaware of Aker's continuing claim to reinstatement in a new position." *Id.*

Thus, upon submission of the parties' briefs, the Court of Appeals had the following before it: (1) Aker's longstanding argument that, under the *McDonnell-Douglas* framework for a retaliation claim, he had established adverse action by virtue of Norton's refusal to implement the Grievance Decision despite his repeated expressions of interest in reinstatement to a new position; (2) Norton's new argument, first raised on appeal, that Aker had failed to establish adverse action because, under a modified *McDonnell-Douglas* test set forth in a line of cases cited for the first time in the Court of Appeals, Aker was required to have taken an additional step, i.e. formally apply for a specific position following the filing of his *pro se* action; and (3) Aker's necessarily brief response to Norton's new argument based on the new line of cases, in which Aker countered that he "did not fail to take any action necessary to be considered for a new position." In reaching its decision, the Court examined Aker's claim of adverse action (preserved in circuit court), examined the factual record, examined the new "failure to hire" precedent presented by Norton, and determined that Aker, based on exceptions created in the very case law cited by Norton, was still correct in claiming adverse action despite the fact that he had failed to submit a formal application for employment following the filing of his *pro se* lawsuit. In short, the Court of Appeals concluded that Norton's new argument, based on new case law, both raised for the first time on appeal, did not negate the showing of adverse action made by Aker in the trial court.

B. Norton Failed to Preserve for Review the Argument that Aker Had Failed to Satisfy the Adverse Element of His *Prima Facie* Case

Under this Court's holdings in *Fischer* and *Roof*, it is Norton who should be barred from claiming on appeal that Aker failed to establish adverse action, since Norton failed to oppose Aker's adverse action claim in circuit court. As Norton points out in its brief to this Court, the rule it cites "applies to bar a party from challenging a necessary element of a cause of action for the first time on appeal." *Fischer*, 348 S.W.3d at 588, *citing, Commonwealth, Transp. Cab., Bureau of Highways v. Roof*, 913 S.W.2d 322, 324 (Ky. 1996) (refusing to allow agency to challenge duty element of negligence for first time on appeal). On this ground alone, this Court should find that, for the purposes of this appeal, Aker's claim to adverse action has been established.

IV. AKER ESTABLISHED THE CAUSATION ELEMENT OF HIS *PRIMA FACIE* RETALIATION CLAIM

Under the *McDonnell-Douglas* framework applicable in retaliation cases, a plaintiff who has established the elements of protected activity and adverse action must still present evidence of a "causal connection" between his protected activity and the employer's adverse action – i.e. evidence of a retaliatory intent on the part of the employer. Evidence of the employer's intent can either be "direct" or circumstantial. As stated by this Court, "[i]n cases where there is no direct evidence of a causal connection, the causal connection of a *prima facie* case of retaliation must be established through circumstantial evidence." *Brooks v. Lexington-Fayette Urban County Hous. Auth.*, 132 S.W.3d 790, 804 (Ky. 2004); *see also, Nguyen v. City of Cleveland*, 229 F.3d 559, 566 (6th Cir. 2000). But "[i]f a plaintiff produces direct evidence [of a retaliatory motive], evidence of the employer's motives . . .

is an issue for trial, not summary judgment." *Young-Losee v. Graphic Packaging Int'l, Inc.*, 631 F.3d 909, 912 (8th Cir. 2011). "Direct evidence is that evidence which, if believed, requires no inferences to conclude that unlawful retaliation was a motivating factor in the employer's action." *Imwalle v. Reliance Med. Prods.*, 515 F.3d 531, 543-544 (6th Cir. 2008).

The Court of Appeals was correct to conclude that this is a case where the plaintiff has produced direct evidence of the employer's retaliatory intent, namely Thomas Powell's announcement on March 5, 2008, that Norton would not consider Aker for employment because of the *pro se* lawsuit he filed one week earlier. Prior to that time, Norton through Powell was still inviting Aker to express "interest[] in pursuing a position with Norton Healthcare." Only after Aker filed suit did Norton take the position that under no circumstances would it consider him for reinstatement and notify Aker and his counsel accordingly. Powell's statement is direct evidence of the causal connection between the filing of the lawsuit and Norton's decision to no longer consider him for a position.

V. THOMAS POWELL'S STATEMENT IS NOT INADMISSIBLE UNDER KRE 408 BECAUSE (1) IT WAS NOT MADE IN COMPROMISE NEGOTIATIONS AND (2) IT CONSTITUTED A SEPARATE AND INDEPENDENT ACT OF RETALIATION

Norton argues that Thomas Powell's March 5, 2008, statement to Erwin Sherman should be excluded from evidence as a "statement made in compromise negotiations." *See*, KRE 408 (2). However, as found by the Court of Appeals, the communications between Sherman and Powell did not constitute compromise negotiations. Sherman inquired with Powell about implementation of the Grievance Decision reinstating Aker's employment, and Powell replied by stating that Norton was refusing to consider reinstatement because of

Aker's *pro se* lawsuit filed several days earlier. As stated by the Court of Appeals, "Powell's alleged statement was not made as part of a settlement negotiation, but was a statement declaring Norton's refusal to consider a compromise or settlement." Court of Appeals Opinion, pg 14, n. 1. The Court of Appeals' ruling is a reasonable and logical application of the express language used in KRE 408, as found in numerous cases interpreting the identical federal rule. As also noted by the Court of Appeals, Aker does not offer Powell's statement to support his underlying discrimination claim, or any other legal claim pending at that time – it is being offered to establish a new claim of retaliation, based on Powell's own words, which had not been uttered, and therefore could not be the subject of compromise negotiations, until after Powell made his statement.

A. Powell's Statement Was Not "Made in Compromise Negotiations"

KRE 408 does not privilege every communication between opposing counsel. The rule's scope is expressly limited to "statements made in compromise negotiations," which are defined earlier in the rule as the "(1) [f]urnishing or offering or promising to furnish; or (2) [a]ccepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise" a claim. KRE 408 (emphasis added.) A leading treatise on Kentucky evidence law states that "[t]here must . . . be an offer or statements made in the context of compromise or concession. A 'take it or leave it' coupled with a threat hardly seems worthy of protection." UNDERWOOD AND WEISSENBERGER, *KENTUCKY EVIDENCE COURTROOM MANUAL, 2014-15 EDITION*, Ch 408, pg 192 [Matthew Bender & Co. 2014].

The communications between Powell and Sherman were completely devoid of any effort to compromise. Sherman was demanding Aker's reinstatement under the terms of the Grievance Decision, nothing less, and Powell was refusing any relief whatsoever. Federal courts have repeatedly found that, where parties are doing nothing more than exchanging demands and refusals, such communications are not considered to be "compromise negotiations." *See, Kraemer v. Franklin & Marshall College*, 909 F. Supp. 267 (E.D. Pa. 1995) (where response of college's counsel to faculty member's demand for tenure track appointment was statement inviting her to proceed with her EEOC charge, communication was "not an offer to settle the claim" and a statement made in the course of that communication was "not a statement made in compromise negotiations"). As stated in another federal decision, "[a]uthority from other federal courts establishes that a demand letter setting forth a party's factual position and asserting legal claims – absent an offer to compromise or settle a claim – does not constitute 'compromise negotiations' under Rule 408." *Poulos v. Summit Hotel Props.*, LLC, 2010 U.S. Dist. LEXIS 50665 (D.S.D. May 21, 2010). Other federal decision reaching the same holding are cited in the footnote below.[14]

---

[14] *Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher*, 123 F.R.D. 237, 242 (S.D. Ohio 1987) (finding letters consisting of factual positions, legal demands, and threats of litigation are not "compromise negotiations" within the meaning of Rule 408); *Sunstar, Inc. v. Alberto-Culver Co.*, 2004 U.S. Dist. LEXIS 16855 (N.D. Ill. Aug. 20, 2004) (admitting letters setting forth parties' factual positions, asserting legal claims, and making legal demands because the letters "fail to contain any suggestion of compromise"); *Atronic Int'l., GmbH v. SAI Semispecialists of America, Inc.*, No. 03-CV-4892, 2006 U.S. Dist. LEXIS 66078, 2006 WL 2654827, at *7 n.4 (E.D.N.Y. Sep. 15, 2006) ("Where a letter provides solely demands and lacks any suggestion of compromise, such a document would not be excludable by Rule 408."); *Rodriguez-Garcia v. Municipality of Caguas*, 495 F.3d 1, 10-12 (1st Cir. 2007) (communications simply providing notice of a forthcoming legal claim without offering or suggesting any concessions are "outside the ambit of Rule 408."); *Winchester Packaging, Inc. v. Mobil Chemical Co.*, 14 F.3d 316, 319 (7th Cir. 1994) (a demand for payment accompanied by a threat of legal action is not a settlement offer).

B. Even If the Conversation Between Powell and Sherman Constituted "Compromise Negotiations," Powell's Statement Is Offered for the Purpose of Establishing a New and Independent Violation, Not as Proof of Any Claim Existing at the Time of the Conversation

KRE 408 permits use of statements made in compromise negotiations when those statements are "offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." KRE 408. Once again, federal decisions construing FRE 408 are instructive. In a case whose facts are similar to those here, the U.S. Court of Appeals for the District of Columbia Circuit held that letters written by an employer's legal counsel relating to settlement of underlying race discrimination claims were admissible to prove a retaliation claim arising from those very letters:

> [A]lthough settlement letters are inadmissible to prove liability or amount, they are admissible 'when the evidence is offered for another purpose.' In particular, such correspondence can be used to establish an independent violation (here, retaliation) unrelated to the underlying claim which was the subject of the correspondence (race discrimination). . . . Carney offered the settlement correspondence not to prove that the University discriminated against her, but to show that the University committed an entirely separate wrong [retaliation] by conditioning her benefits on a waiver of her rights. The letters were therefore admissible.

Carney v. American Univ., 151 F.3d 1090 (D.C. Cir. 1998), *citing, inter alia,* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5314, at 282 (1980) ("Rule 408 is [] inapplicable when the claim is based upon some wrong that was committed in the course of settlement discussions; e.g., libel, assault, breach of contract, unfair labor practice, and the like . . . Rule 408 does not prevent the plaintiff from proving

his case; wrongful acts are not shielded because they took place during compromise negotiations").

In another retaliation case, brought under the National Labor Relations Act, the Sixth Circuit held that "Rule 408 does not exclude evidence of alleged threats to retaliate for protected activity when the statements occurred during negotiations focused on the protected activity and the evidence serves to prove liability either for making, or later acting upon, the threats." *Uforma/Shelby Bus. Forms v. NLRB*, 111 F.3d 1284 (6th Cir. 1997).

In a Tennessee case citing both *Carney* and *Uforma*, the federal district court permitted the plaintiff to use statements made by the employer's representative during settlement negotiations on her existing discrimination and retaliation claims to constitute the basis of a separate retaliation action. *Burress v. City of Franklin*, 809 F. Supp. 2d 795, 819 (M.D. Tenn. 2011). "Because the plaintiff was not seeking to use [the employer's statements] as evidence of the validity or invalidity of the discrimination or retaliation claims that were the subject of the settlement discussions, Rule 408 does not come into play." *Id.* "Rule 408 is simply not applicable when the claim at issue arises out of wrongful conduct allegedly committed over the course of a settlement discussion." *Id.*[15]

---

[15] *See also, Scott v. Goodman*, 961 F. Supp. 424, 437-38 (E.D.N.Y. 1996), a First Amendment retaliation case in which the employer, in settlement negotiations, sought to condition the plaintiff's reinstatement on waiver of her First Amendment rights:

> Although Goodman's offer to settle would not be admissible as an admission of liability on the underlying anti-union claim, Rule 408's prohibition is "inapplicable" where, as here, the waiver-of-rights claim is based upon an alleged wrong – i.e., the conditioning of Scott's reinstatement on the waiver of her First Amendment right to commence a lawsuit – committed during the course of alleged settlement discussions. In these circumstances, Goodman's statements are the very source and substance of a different and independent First Amendment cause of action.

C. The Court Decisions Cited by Norton Do Not Support its Contention That Thomas Powell's Statement Cannot Constitute the Basis of a Retaliation Claim

Norton cites a number of cases for the proposition that "statements or offers in settlement discussions should not support a retaliation claim." [Norton's Brief of Appellant, pgs 18-19.] Upon closer examination, however, none offer support for Norton's position in this case.

In *Chapter 7 Trustee v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1260, n. 8 (11th Cir. 2012), the court stated, as Norton reports, that settlement offers cannot "ordinarily" constitute retaliation. But the court went on to hold that, in the case before it, the employer's offer of light-duty employment, to which the plaintiff was already entitled, conditioned on the plaintiff's dropping of her EEOC complaint constituted evidence of a retaliatory motive for her filing that complaint. *Id.*

The *Gupta* case stands for the unremarkable proposition that an employer's action in settling or not settling an employee's discrimination claim cannot, by itself, constitute retaliation for the employee's original claim. *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 589 (11th Cir. 2000), *overruled in part on other grounds by Crawford v. Carroll*, 529 F.3d 961 (11th Cir 2008).

Steffes v. Stepan Co., 144 F.3d 1070, 1076 (7th Cir. Ill. 1998) does not concern settlement negotiations or statements made in the context of settlement negotiations. *Steffes* holds that an employer's litigation tactics, such as contacting the plaintiff's current employer as part of the discovery process or instructing its employees not to give affidavits or offer

---

Scott v. Goodman, 961 F. Supp. 424, 438 (E.D.N.Y. 1996).

other assistance to the plaintiff, cannot be considered acts in retaliation for filing the underlying lawsuit.

In *Hotchkiss v. CSK Auto, Inc.*, 949 F. Supp. 2d 1040, 1053 (E.D. Wash. 2013), the court rejected the plaintiff's claim that her employer's offer to rehire her in exchange for a release of all claims constituted "malice and/or careless disregard" for her federally-protected rights under the Americans With Disabilities Act, finding that the employer's offer was nothing more than an effort to resolve the dispute.

In *Wan Sun Penny v. Winthrop-University Hosp.*, 883 F. Supp. 839, 846 (E.D.N.Y. 1995), the court held that, in a discrimination case where the employee has already been terminated and has threatened legal action, offers of settlement of the dispute on condition of waiver and release of the claim are inadmissible as evidence of discrimination, stating that "[t]he only time such evidence is admissible is when, contemporaneously with the notice of termination, the employee is asked to sign a waiver and release of all claims in order to receive severance pay."

In *Kratzer v. Collins*, 295 F. Supp. 2d 1005, 1017 (N.D. Iowa 2003), the plaintiff argued that her employer's offer of training and testing for the promoted position she had sought, in exchange for the dismissal of her civil rights suit qualified as retaliation because "it did not allow for adequate time to train and test for the promotion." The court rejected the plaintiff's claim, stating that the employer's offer was merely an effort to compromise a claim, especially since the plaintiff was not otherwise eligible to train and test for the promotion at the time the offer was made.

In *Carney v. American Univ*, 960 F. Supp. 436, 449 (D.D.C. 1997), the district court's decision that the employer's settlement letter was inadmissible under FRE 408 was reversed by the D.C. Circuit in the *Carney* case sited by Aker, *supra*. As stated by the circuit court,

> We disagree with the district court . . . Carney offered the settlement correspondence not to prove that the University discriminated against her, but to show that the University committed an entirely separate wrong by conditioning her benefits on a waiver of her rights. The letters were therefore admissible.

Carney, 151 F.3d at 1095-96.

In *Wilkinson v. Clark County Sch. Dist.*, 2010 U.S. Dist. LEXIS 131855 (D. Nev. Dec. 13, 2010), the plaintiff in a Title VII discrimination case sought to rely on comments made by an employer representative at a grievance hearing, at which time the employer allegedly offered to ignore a complaint made against her if she dropped her pending EEOC charges. It is unclear from the text of the decision what the plaintiff's reasoning was – but the district court found that the employer's offer was inadmissible, citing *Kratzer*, *supra*.

None of these cases even speak to the issue presented in this case. Unlike the plaintiff in *Steffes*, Aker is not contesting Norton's discovery or other litigation tactics. Unlike the plaintiff in *Gupta*, Aker is not claiming that Norton's mere refusal to settle his claims is actionable. The decisions in *Gate Gourmet*, *Hotchkiss*, *Wan Sun Penny*, *Kratzer*, and *Wilkinson* all stand for the proposition that a retaliation claim cannot be based on the settlement terms offered by an employer, except in limited circumstances. But Aker, unlike the plaintiffs in those cases, is not protesting the terms of any settlement offer made by Norton. Aker's claim is that Norton's action to stop considering him for a position because

of his *pro se* lawsuit, as expressly stated by Thomas Powell on March 5, 2008, constituted retaliation for the act of filing suit.

The final two cases cited by Norton are *Bank One v. Murphy*, 52 S.W.3d 540 (Ky. 2001) and *Dokes v. Jefferson County*, 61 Fed. Appx. 174 (6th Cir. 2003). *Murphy* has no bearing whatsoever on this case. Citing the statute that expressly authorizes declaratory rights actions (KRS 418.045), *Murphy* holds that an employer is free to bring a declaratory rights action against an employee without the action being considered retaliatory for the employee's pending discrimination claim. The fact situation in this case is not even remotely analogous. Norton did not file a declaratory rights action or take any other action to clarify its rights with regard to Aker either before or after it informed him that it would not consider him for a position because of his lawsuit.

The *Dokes* decision is no more helpful to Norton. In *Dokes*, the Sixth Circuit held that "[i]f an employer voluntarily pays a terminated employee pending negotiations to settle an underlying Title VII dispute, it is not Title VII retaliation to cease the voluntary payments when the settlement negotiations break down." *Dokes* 61 Fed. Appx. at 180. Once again, there are no analogous facts in this case. There was no cessation of benefits and there was no break down of settlement negotiations in this case.

D. The Court of Appeals' Holding Does Not Create a Chilling Effect on Settlement Negotiations or Undermine the Policy Considerations Underlying KRE 408

Norton argues that the decision below undermines the privilege accorded settlement negotiations, resulting in a "chilling effect" on efforts to resolve disputes. Nothing could be further from the truth. Prudent attorneys clarify with opposing counsel an understanding that

they are speaking in the context of settlement negotiations before going forward with statements they would not otherwise make, e.g. statements that could be construed as admissions in the underlying controversy. All attorneys know that, at all times, they must avoid making statements that might expose their clients to new grounds of liability. The evidence in this case is that, in his conversation with Erwin Sherman, Mr. Powell failed to observe either of these universal, time-honored and commonsense precautions.

Norton further contends that, under the Court of Appeals decision, a lawyer defending an employer would be, at a minimum, extremely reluctant to discuss issues of reinstatement for fear of spawning an additional retaliation claim against his client, or even against the lawyer. Norton Brief of Appellant, pg 18. It is difficult to imagine why that would be true. Under the Court of Appeals ruling, as under the rulings of *Carney*, *Uforma* and the other cases cited here, an employer's attorney is perfectly free to discuss reinstatement, refuse reinstatement or offer some compensation in lieu of reinstatement, provided that he avoids what every employer's lawyer should avoid at all times – communicating an unlawful motive for the employer's refusal to reinstate.

CONCLUSION

For the foregoing reasons, the Appellee submits that he has established the "adverse action" and "causal connection" elements of his *prima facie* case of retaliation against Norton Healthcare; that the statement of Norton's Associate Vice President and Assistant General Counsel to the Appellee's attorney on March 5, 2008, was not inadmissible as a statement made in compromise negotiations; that Norton's appeal should be denied; and that the Appellee should be permitted to present his retaliation claim at trial in the circuit court.

Respectfully submitted,

PRIDDY, CUTLER, NAAKE & MEADE, PLLC

EVERETT C. HOFFMAN
800 Republic Building
429 W Muhammad Ali Blvd
Louisville, KY 40202-2346

Tel 502/744-9119
Fax 502/569-2744
Email hoffman@pcnmlaw.com

COUNSEL FOR APPELLEE, LUAL A. DENG (formerly Jacob L. Aker)